

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000567-DG

GEORGE S. HAGEN

APPELLANT

v. ON DISCRETIONARY REVIEW FROM MARION CIRCUIT COURT  
HONORABLE DOUGLAS GEORGE, JUDGE  
ACTION NO. 99-XX-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: GUIDUGLI, KNOFF AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: George S. Hagan ("Hagan") appeals from a conviction entered via a conditional plea of guilty (RCr 8.09) to one count of operating a motor vehicle while under the influence of alcohol, first offense. We affirm.

On December 26, 1998, Hagan was charged in Marion District Court with one count of operating a motor vehicle under the influence of alcohol, first offense. At the time of the alleged offense, Hagan's blood alcohol level was 0.186%. Pursuant to KRS 189A.010(4)(a), Hagan, if convicted, was subject to a mandatory sentence enhancement because his blood alcohol level was greater than 0.18%.

On March 19, 1999, Hagan tendered a motion to declare 189A.010(4)(a) unconstitutional.<sup>1</sup> The motion was denied on March 25, 1999. Thereafter, Hagan entered a conditional plea of guilty, subject to further adjudication of the constitutional issue. The constitutional issue was appealed to the Marion Circuit Court, which affirmed on February 8, 2000. This discretionary appeal followed.

Hagan now argues that the circuit court erred in affirming the district court's ruling that 189A.010(4)(a) is not unconstitutional. Specifically, Hagan argues that the statute violates due process because it treats intoxicated drivers differently based on the type of intoxicating agent ingested (alcohol or narcotic) and whether a person consents to blood alcohol testing. He also maintains that selecting a blood alcohol level of 0.18% for sentence-enhancement is arbitrary, and is not rationally related to a legitimate government interest.

We have closely studied the record, the law, and the arguments of counsel, and cannot conclude that the circuit court erred in affirming the district court's ruling on this issue. We agree with the Commonwealth's assertion that Commonwealth v. Howard, Ky., 969 S.W.2d 700 (1998) provides the necessary constitutional analysis. Howard held, in relevant part, that driving an automobile is not a fundamental constitutional right, but a legitimately regulated privilege. Id. at 702. As such, the appropriate standard of review is the rational basis test,

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<sup>1</sup>KRS 189A.010 was amended by 2000 Kentucky Acts Ch. 467, Section 2 (effective October 1, 2000).

i.e., whether the classification rationally promotes a legitimate state interest. Id. "Under the rational basis test, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id.

In the matter at bar, the primary classification with which Hagan takes issue is the 0.18% blood alcohol level. He maintains that such a classification is arbitrary and therefore unconstitutional. Under Howard, though, the dispositive question is whether the distinction (in this case, less than 0.18% v. more than 0.18%) rationally promotes a legitimate state interest. Clearly, the interest which said distinction seeks to protect is the safety of those who share the roadways with those who choose to drive while intoxicated. This interest has been examined in a number of published and unpublished opinions in recent years as the legislature has enacted increasingly strict DUI penalties. In Cornelison v. Commonwealth, No. 1999-CA-001825-MR, rendered July 7, 2000 (discretionary review pending), for example, we exhaustively examined the issues now presented and found KRS 189A.010 to pass constitutional muster. We need not enter into a protract analysis of Cornelison herein.

In sum, it is universally acknowledged that the greater a driver's insobriety, the greater the risk he poses to the general public. The protection against this risk is a legitimate state interest which reasonably supports the enactment of stricter DUI penalties for higher levels of intoxication and recitivism. As such, we are of the opinion that KRS

189A.010(4)(a) as enacted at the time of Hagan's offense and prosecution was constitutional.

For the foregoing reasons, we affirm the judgment of the Marion Circuit Court.

SCHRODER, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT ONLY.

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